

Office of Chief Counsel
Internal Revenue Service
memorandum
CC:LM:CTM:LN:TL-N-5533
JAMoon

date:

to: Chief, Examination Division, Southern California District
Attention: [REDACTED], CEP Case Manager
[REDACTED], CEP Team Coordinator
CE: [REDACTED], Santa Ana

Audie Sturla, Group Manager, Employment Tax
Tony Lloren, Employment Tax Specialist
FE: 1417, Santa Ana

from: June Y. Bass, Associate Area Counsel, LMSB
Joyce M. Marr, Attorney
Jenny A. Moon, Attorney

subject: Request for Pre-Review of Non-docketed Significant Advice
Taxpayers: (1) [REDACTED] (EIN [REDACTED]¹),
(2) [REDACTED] (EIN [REDACTED]),
(3) [REDACTED] (EIN [REDACTED]); and
(4) [REDACTED] (EIN [REDACTED]²)

Issue: Executing Forms SS-10 and Forms 4016 for years prior to
[REDACTED]
Statute of Limitations: [REDACTED]

THIS ADVICE CONSTITUTES RETURN INFORMATION SUBJECT TO I.R.C. § 6103.
THIS ADVICE CONTAINS CONFIDENTIAL INFORMATION SUBJECT TO ATTORNEY-
CLIENT AND DELIBERATIVE PROCESS PRIVILEGES AND IF PREPARED IN
CONTEMPLATION OF LITIGATION, SUBJECT TO THE ATTORNEY WORK PRODUCT
PRIVILEGE. ACCORDINGLY, THE EXAMINATION OR APPEALS RECIPIENT OF THIS

¹ We note a discrepancy in the EIN for this entity. The spreadsheet you have prepared for us shows the EIN as "[REDACTED]", while the rider affixed to the Form SS-10 currently in effect for [REDACTED] (the "[REDACTED]") shows the EIN as "[REDACTED]". For purposes of this memorandum, we have decided to rely on the EIN shown on the [REDACTED].

² You have requested our advice with respect to "[REDACTED]", with this EIN. However, the [REDACTED] associates this EIN with "[REDACTED]" not "[REDACTED]" (with EIN [REDACTED]). We opine as to EIN [REDACTED], not EIN [REDACTED].

DOCUMENT MAY PROVIDE IT ONLY TO THOSE PERSONS WHOSE OFFICIAL TAX ADMINISTRATION DUTIES WITH RESPECT TO THIS CASE REQUIRE SUCH DISCLOSURE. IN NO EVENT MAY THIS DOCUMENT BE PROVIDED TO EXAMINATION, APPEALS, OR OTHER PERSONS BEYOND THOSE SPECIFICALLY INDICATED IN THIS STATEMENT. THIS ADVICE MAY NOT BE DISCLOSED TO TAXPAYERS OR THEIR REPRESENTATIVES.

THIS ADVICE IS NOT BINDING ON EXAMINATION OR APPEALS AND IS NOT A FINAL CASE DETERMINATION. SUCH ADVICE IS ADVISORY AND DOES NOT RESOLVE SERVICE POSITION ON AN ISSUE OR PROVIDE THE BASIS FOR CLOSING A CASE. THE DETERMINATION OF THE SERVICE IN THE CASE IS TO BE MADE THROUGH THE EXERCISE OF THE INDEPENDENT JUDGMENT OF THE OFFICE WITH JURISDICTION OVER THE CASE.

The purpose of this memorandum is to modify and supplement our prior advice, dated December 5, 2000, in light of the fact that Exam has decided to secure individual Form SS-10, "Consent to Extend the Time to Assess Employment Taxes," from the following four entities:

1. [REDACTED] (EIN [REDACTED])
2. [REDACTED] (EIN [REDACTED]);
3. [REDACTED] (EIN [REDACTED]); and
4. [REDACTED] (EIN [REDACTED]).

Another purpose of this memorandum is to recommend that you obtain a transferee consent, Form 4016, "Consent Fixing Period of Limitation Upon Assessment of Employment or Miscellaneous Excise Taxes Against a Transferee," from the successor corporation for each of the foregoing entities.

Given the imminent expiration of the statute of limitations, we have assumed in rendering this memorandum that the statute of limitations for the assessment of employment taxes with respect to the foregoing entities has been validly extended through [REDACTED]. Furthermore, our advice herein is applicable for tax years prior to (but not including) the [REDACTED] year.³

³ We note that the Forms SS-10 to be secured from the parent corporations-i.e. [REDACTED] and [REDACTED]-should be captioned as we had recommended in our prior advice, dated December 5, 2000, for tax periods prior to [REDACTED].

ISSUES

For each of the following entities, (a) how should the entity's name be captioned on the Form SS-10, and (b) whether a transferee consent should be obtained from the corporation into which the entity was merged:

1. [REDACTED] (EIN [REDACTED]);
2. [REDACTED] (EIN [REDACTED]);
3. [REDACTED] (EIN [REDACTED]); and
4. [REDACTED] (EIN [REDACTED]).

CONCLUSIONS

1. [REDACTED]

a. The Form SS-10 (for relevant periods prior to [REDACTED]) should be captioned as follows:

[REDACTED] (EIN [REDACTED]) (formerly known as [REDACTED] and/or [REDACTED]), as successor in interest to [REDACTED] (EIN [REDACTED]), as successor in interest to [REDACTED] (EIN [REDACTED]).

b. Yes, you should obtain a Form 4016 from [REDACTED] for the employment tax liabilities of [REDACTED] for years prior to [REDACTED].

In the space labeled "(Name)", you should insert: "[REDACTED] (EIN [REDACTED]) (formerly known as [REDACTED] of [REDACTED] and/or [REDACTED])."

On the line following the words "imposed against, or due from," you should insert: "[REDACTED] (EIN [REDACTED]), as a successor in interest to [REDACTED] (EIN [REDACTED])."

2. [REDACTED]

a. The Form SS-10 (for relevant periods prior to [REDACTED]) should be captioned as follows:

[REDACTED] (EIN [REDACTED]) (formerly known as [REDACTED] and/or [REDACTED]), as successor in interest to [REDACTED] (EIN [REDACTED]).

b. The Form 4016 should be obtained from [REDACTED]

for the employment tax liabilities of [REDACTED] for years prior to [REDACTED].

In the space labeled "(Name)", you should insert:
"[REDACTED] (EIN [REDACTED]) (formerly known as [REDACTED]
of [REDACTED] and/or [REDACTED])."

On the line following the words "imposed against, or due from," you should insert: "[REDACTED] (EIN [REDACTED])."

3. [REDACTED]

a. The Form SS-10 (for relevant periods prior to [REDACTED]) should be captioned as follows:

[REDACTED] (EIN [REDACTED]) (formerly known as [REDACTED] and [REDACTED]), as successor in interest to [REDACTED] (EIN [REDACTED]).

b. The Form 4016 should be obtained from [REDACTED] of [REDACTED] for the employment tax liabilities of [REDACTED] for periods prior to [REDACTED].

In the space labeled "(Name)", you should insert:

[REDACTED] (EIN [REDACTED]) (formerly known as [REDACTED] and [REDACTED]).

On the line following the words "imposed against, or due from," you should insert: "[REDACTED] (EIN [REDACTED])."

4. [REDACTED]

a. The Form SS-10 (for relevant periods prior to [REDACTED]) should be captioned as follows:

[REDACTED] (EIN [REDACTED]) (formerly known as [REDACTED] and [REDACTED]).

b. Unlike the other three entities, it appears that [REDACTED] underwent a name change only, not a merger. Thus, there is no "transferee" from whom a Form 4016 could be obtained.

The Forms SS-10 and 4016 may be signed by a duly authorized

officer of the respective entity, or an agent or attorney of such entity who is specifically authorized to execute the form by a power of attorney. Please double check all EINs and current addresses.

FACTS

1 and 2. [REDACTED] and [REDACTED]

Prior to [REDACTED], all capital stock of [REDACTED], and [REDACTED] was owned by [REDACTED], an Indiana corporation. See (unnumbered) first paragraph of the "Agreement of Merger" (attached hereto as Exhibit A). [REDACTED], [REDACTED], and [REDACTED] were California corporations.

As of [REDACTED], [REDACTED] and [REDACTED] were merged "with and into" [REDACTED] pursuant to §§ 1100 et. seq. of the California Corporations Code, with [REDACTED] as the surviving corporation; the separate corporate existence of [REDACTED] and [REDACTED] ceased upon the merger. See numbered ¶ 1 of the Agreement of Merger.

Paragraph numbered 6 of the Agreement of Merger stated:

6. Effect of Merger. At the Effective Time, the separate corporate existence of [REDACTED] and [REDACTED] shall cease, and [REDACTED] shall succeed, without other transfer, to all the rights and property of [REDACTED] and [REDACTED] and shall be subject to all the debts and liabilities of [REDACTED] and [REDACTED] in the same manner as if [REDACTED] had itself incurred them. . . . Any action or proceeding pending by or against [REDACTED] or [REDACTED] may be prosecuted to judgment, which shall bind [REDACTED], or [REDACTED] may be proceeded against or substituted in its place.

The Agreement of Merger was to be governed by the laws of the State of California. ¶ 8 of the Agreement of Merger.

On [REDACTED], [REDACTED] was merged "with and into" [REDACTED], a California corporation, pursuant to a "Merger Agreement," (attached hereto as Exhibit B), whereby

[REDACTED] became the surviving corporation and the separate corporate existence of [REDACTED] ceased.

Paragraph numbered 2.2 of the Merger Agreement stated:

2.2 Effect of the Merger. Upon completion of the Merger, [REDACTED] shall possess any and all rights, privileges, franchises, immunities, and licenses of each of the Constituent Corporations [i.e. [REDACTED] and [REDACTED]]. . . .

[REDACTED] shall be responsible and liable for all liabilities and obligations of each of the Constituent Corporations, as required by California Law. . . .

The Merger Agreement was to be governed by the laws of the State of California. Numbered ¶ 2.1 of the Merger Agreement.

An [REDACTED] transcript (attached hereto as Exhibit C) indicates that [REDACTED] subsequently changed its name to [REDACTED], with a current mailing address in [REDACTED].

3. [REDACTED]

On [REDACTED], [REDACTED], a Colorado corporation, was merged "with and into" [REDACTED], a Colorado corporation, pursuant to an "Articles of Merger," whereupon the separate corporate existence of [REDACTED] ceased. The Articles of Merger provided, "All debts, liabilities and duties of [REDACTED] shall thence forth attach to [REDACTED]." Attached hereto as Exhibit D is a statement (including a copy of the Articles of Merger) that was affixed to [REDACTED]'s income tax return for the tax year ended [REDACTED].

An [REDACTED] transcript, attached hereto as Exhibit E, indicates that [REDACTED] changed its name to [REDACTED], which subsequently changed its name to [REDACTED]. See also Form 851, "Affiliation Schedule," affixed to [REDACTED]'s income tax return for the year ended [REDACTED], referring to [REDACTED] as "(formerly [REDACTED])".

4. [REDACTED]

As noted above, it appears that [REDACTED] changed its name to [REDACTED], which, in turn,

changed its name to [REDACTED]

DISCUSSION

I. Generally

As we noted in our prior memorandum, dated December 5, 2000, when state law so provides, the successor in interest is primarily liable for the debts and obligations of the absorbed corporation. Phillips v. Lyman H. Howe Films Co., 33 F.2d 891, 892 (3d Cir. 1929).

The party that is liable for the debts of the merged corporation is the one that must sign the waiver of the statute of limitations on behalf of the merged corporation. See Gott v. Live Poultry Transit Co., 17 Del. Ch. 288, 153 Atl. 801 (1931). When state law provides for primary liability of a surviving corporation after a statutory merger, the surviving corporation should sign the consent to extend the statute of limitations as "surviving corporation, successor in interest to predecessor corporation." Primary Liability and Transferee Liability of Successor Corporation, G.C.M. 34,970, I-4092 (July 31, 1972).

California law provides:

Upon merger pursuant to this chapter the separate existence of the disappearing corporations ceases and the surviving corporation shall succeed, without other transfer, to all the rights and property of each of the disappearing corporations and shall be subject to all the debts and liabilities of each in the same manner as if the surviving corporation had itself incurred them.

CAL. CORP. CODE § 1107(a) (Deering 2000).

Colorado law provides that when a merger takes effect:

(a) Every other corporation party to the merger merges into the surviving corporation and the separate existence of every corporation party to the merger except the surviving corporation ceases;

. . . .

(c) The surviving corporation has all liabilities of each corporation party to the merger;

COLO. REV. STAT. § 7-111-106 (2000).

With respect to transferee liability, as we noted in our prior memorandum, dated December 8, 2000, the Service will attempt to assert that a successor is a transferee, as a last resort, when the statute of limitations under I.R.C. § 6501 has expired but the statute of limitations under I.R.C. § 6901 is still open. See GCM 34,970, at page 18, and CCDM 35.10.6.1 ("should the issuance of a new statutory notice be barred by the statute of limitations, it is advisable that the case be processed and handled as a transferee case").

Section 6901 does not create or define the existence of a transferee's liability, but affords the Commissioner a procedural remedy for collection of tax. Adams v. Commissioner, 70 T.C. 373 (1978), aff'd in part without published opinion and dismissed in part, 688 F.2d 815 (2d Cir. 1982); and Gumm v. Commissioner, 93 T.C. 475, 479 (1989). Under I.R.C. § 6901(a)(2), assertion of transferee liability for employment taxes is allowed if the transferee liability arose on the liquidation of a partnership or corporation, or on a reorganization within the meaning of I.R.C. § 368(a).

II. Application of the Law

A & B. [REDACTED] and [REDACTED]

1. Forms SS-10

The merger agreements, by which [REDACTED] was merged into [REDACTED], which then was merged into [REDACTED], provided that the agreements were to be governed by the laws of the State of California, and that each surviving corporation would assume or succeed to the liabilities of the merged corporations.

Here, according to California law and the terms of the merger agreements, [REDACTED], currently known as [REDACTED], is primarily liable, as a successor in interest, for the employment taxes of [REDACTED] and [REDACTED]. Consequently, you should secure Forms SS-10 from [REDACTED] for the employment tax liabilities of each of these two entities.

2. Forms 4016

Furthermore, the Service could reasonably argue that [REDACTED] is a transferee at law by virtue of the contractual liabilities provided for in the merger agreements pursuant to which [REDACTED] merged into [REDACTED], which then merged into [REDACTED] (aka [REDACTED]).

[REDACTED]).

Thus, in an abundance of caution, we recommend you secure Forms 4016 from [REDACTED] for the employment tax liabilities of each entity.

C. [REDACTED]

1. Form SS-10

The merger agreement, by which [REDACTED] was merged into [REDACTED] does not have a "choice of law" provision specifying the state law to be used in governing or construing it. However, given that the agreement was executed pursuant to an expressed provision of the Colorado statute and that the merger involved Colorado corporations, the agreement should be construed in accordance with Colorado law.

Here, according to Colorado law and the terms of the merger agreement, [REDACTED] is primarily liable, as a successor in interest, for the employment taxes of [REDACTED] from [REDACTED]. Consequently, you should secure a Form SS-10 [REDACTED] (formerly known as [REDACTED]), and [REDACTED] with respect to the employment tax liabilities of [REDACTED].

2. Form 4016

Again, the Service could reasonably argue that [REDACTED] is a transferee at law by virtue of the contractual liability provided for in the merger agreement pursuant to which [REDACTED] merged into [REDACTED]. In addition to the contractual liability, I.R.C. § 6901(a)(2) provides for an assertion of transferee liability for employment taxes if the transferee liability arose pursuant to a I.R.C. § 368(a) reorganization. In the case at hand, the taxpayer has represented, in a statement attached hereto as Exhibit xx, that the merger was a reorganization under I.R.C. § 368(a)(1)(A).⁴

Consequently, we recommend you secure a Form 4016 from [REDACTED] for the employment tax liabilities of [REDACTED].

⁴ We render no opinion as to whether the merger was, in fact, a valid reorganization under I.R.C. § 368(a).

D. [REDACTED]

1. Form SS-10

Assuming a name change only, the Form SS-10 should be captioned as follows:

[REDACTED] (EIN [REDACTED]) (formerly known as [REDACTED] and [REDACTED]).

2. Form 4016

Since you have not provided us with facts to indicate that this entity was merged or sold, there is no "transferee" from whom a Form 4016 could be obtained.

If you have any questions, please contact Jenny A. Moon at 949-360-3431 or Joyce M. Marr at 949-360-2688.

Attachments:

Exhibit A: "Agreement of Merger" ([REDACTED])

Exhibit B: "Merger Agreement" ([REDACTED] into [REDACTED])

Exhibit C: [REDACTED] transcript, dated [REDACTED], for EIN [REDACTED]

Exhibit D: Statement affixed to [REDACTED]
[REDACTED]'s income tax reutrn for the tax year ended June 30, [REDACTED].

Exhibit E: [REDACTED] transcript, dated [REDACTED], for EIN [REDACTED].